

STATE OF DELAWARE THE COURTS OF THE JUSTICES OF THE PEACE 820 NORTH FRENCH STREET, 11TH FLOOR WILMINGTON, DELAWARE 19801

WILLIAM F, RICHARDSON CHIEF MAGISTRATE

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LEGAL MEMORANDUM 90-176

TO:

ALL JUSTICES OF THE PEACE W.F. Kichardson

STATE OF DELAWARE

FROM:

WILLIAM F. RICHARDSON

CHIEF MAGISTRATE

DATE:

JUNE 22, 1990

RE:

BOATING UNDER THE INFLUENCE

On May 18, 1990, Governor Castle signed House Bill No. 290 as amended by Senate Amendment Nos. 1, 3, and 6. This Act creates a new chapter (Chapter 23) in Title 23 of the Delaware Code and eliminates 23 Del. C., \$2116(b)(2) which previously addressed the "use" of a vessel, water skis, aquaplane, surfboard, or similar device by a person under the influence of alcohol or drugs. This legislation, a copy of which was distributed at this month's judge's meeting in each county, makes it unlawful for any person to "motor, sail, row, operate, command, or have actual physical control of any vessel or boat underway on Delaware waters while under the influence of intoxicating liquor or drugs, or any combination of drugs and/or intoxicating liquors." 23 Del. C., \$2302(a).

The provisions of this new boating statute are virtually identical to the provisions of Delaware's Driving Under the Influence laws found at 21 Del. C., §§4177, 2740, 2741, 2747, 2749, and 2750, with the obvious exception that the new Act applies to vessels and boats. A vessel is defined as "every device in, upon, or by which any person may be transported upon the water excepting devises moved by human power." 23 Del. C., first impression, (Emphasis added.) At §2301(a). definition may appear to conflict with the reference to "rowing" contained in the language of \$2302(a) outlined above. However, while a device which is moved by human power may not fall within the statutory definition of "vessel", remember that this law also specifically applies to "boats". Although the Delaware Code provides no definition of "boat", 23 Del. C., \$2112 provides that "[u]nless as otherwise provided for in this section or Department regulations, the definitions used in this chapter shall be the same as those used in the Federal Boat Safety Act of 1971..." Pursuant to that Act found at 46 U.S.C., \$1452, the term "boat" refers to:

1. Any vessel:

- A. manufactured or used primarily for noncommercial use; or
- B. leased, rented, or chartered to another for the latter's noncommercial use; or
- c. engaged in the carrying of six

¹Where the new law is silent regarding the definition of terms, those definitions already outlined in Chapter of Title 23 for the previous Boating Under the Influence section should be used.

or fewer passengers.

2. Vessel includes every description of watercraft other than a seaplane on the water, used or capable of being used as a means of transportation on the water.

Furthermore, Webster's New World Dictionary defines "boat" as "a small, open vessel or watercraft propelled by oars, sails, or engine or a large vessel; ship". (Webster's New World Dictionary, 2d Edition 1984.)

Consequently, application of the Federal statutory definition of "boat" as well as that term's common usage makes it clear that an individual who is under the influence while paddling a canoe or rowing a rowboat may be in violation of \$2302(a) even though it is moved by human power.

The only other definition outlined in this new statute is the term "under way" which describes any vessel "which is not at anchor or made fast ashore." 23 Del.C., \$2301(b).

One definition that is not included in Chapter 23 is that of "Delaware waters" referred to in \$2302(a). However, this term is covered by 23 <u>Del. C.</u>, \$2112(4) which defines "Waters of the State" as "any waters within the territorial limits of this State, the marginal sea adjacent to this State and the high seas when navigated as part of a journey or ride to or from the shore of this State." The reference in this section to the "high seas" may have been included to allow the marine police to pursue violators attempting to avoid apprehension by fleeing into international waters. For purposes of state enforcement of 23 <u>Del. C.</u>, \$2302(a), however, violations must occur within the limit of 3 miles from the Delaware coastline.

Perhaps the greatest difference between the Driving and Boating Under the Influence laws of Delaware is that the boating statute contains no provision for a first offender's election in lieu of trial like that found at 21 Del. C., §4177B. The fines and terms of imprisonment for Boating Under the Influence are identical to those for Driving Under the Influence. However, since the boating statute is silent on the suspension of penalties, the Court may suspend the fine and/or imprisonment not only for a first offense but also for subsequent offenses, which 21 Del. C., §4177(f) prohibits in motor vehicle cases.

It should also be noted that the provisions of 11 Del. C., \$3505 pertaining to evidence of alcohol in blood specifically apply only to motor vehicle cases. These provisions do not apply to boating cases. Consequently, while a blood alcohol content of 5/100 of 1% or less constitutes prima facie evidence that a defendant was not under the influence in a motor vehicle case, the same reading may be used as affirmative evidence that a defendant was under the influence in a boating case.

Another difference between Delaware's Driving and Boating Under the Influence statutes exists with regard to appeals. A defendant who has been convicted of Driving Under the Influence has 15 days from the time of conviction to appeal to Superior Court if that defendant's sentence includes any period of imprisonment or the payment of a fine in excess of \$100. 21 Del. C., \$708(b). There is no provision in the boating statute that addresses appeals. Therefore, because Boating Under the Influence is an unclassified misdemeanor within the definition of 11 Del. C., \$4202(b), the procedures for appeal are the same as

those for other Title 11 misdemeanors. Accordingly, a defendant who has been convicted of Boating Under the Influence has 15 days from the date of sentencing to appeal to Superior Court if his sentence exceeds either 30 days imprisonment or a \$100 fine. (Del. Const. Art. IV, \$28; Super. Ct. Cr. R. 37.)

The boating and driving laws are also quite different in the area of the initial stop. A police officer must have some "reasonable and articulable suspicion" to stop the driver of a motor vehicle. In contrast, 23 Del. C., \$2118(d) authorizes the marine police and anyone else who is empowered to enforce state laws and Department of Natural Resources and Environmental Control (DNREC) regulations to stop and board any vessel subject to state laws or DNREC regulations for the purpose of inspecting or determining compliance with those laws and regulations. As a result, a marine police officer may conceivably stop and board a vessel pursuant to 23 Del. C., \$2118(d) simply to determine if the operator has the required number of life jackets aboard. If, once on board, the officer detects the odor of alcohol coming from the operator, he may begin to assemble probable cause for an arrest for boating under the influence.

Finally, for sentencing purposes in Boating Under the Influence cases, judges will need to know whether or not a defendant has been convicted of a prior offense within the preceeding 5 years or, if the prior offense involved injury or

²State v. Prouse, Del. Supr., 382 A.2d 1359 (1978) aff'd 440 U.S. 648, 99 S. Ct. 1391, 59 L.Ed. 2d 660 (1979); see also Legal Memorandum 82-85 dated April 1, 1985 with Supplement dated May 11, 1985.

death, within the preceeding 10 years. Toward this end violations of 23 Del. C., \$2302(a) are being added to the criminal offense statute table maintained by DELJIS. Convictions under this statute will be reflected in the DELJIS data base as courts begin to enter that caseload data. The DNREC, Coast Guard, and other agencies having criminal law enforcement functions will be able to retrieve criminal history data from the field by radio or telephone through DELJIS terminals currently located with the Marine Police (DNREC), Capitol Police (DNREC) Radio Dispatch facility) or any other available DELJIS terminal.

WFR: jp

cc: The Honorable Andrew D. Christie The Honorable William T. Allen The Honorable Albert J. Stiftel The Honorable Robert H. Wahl The Honorable Robert D. Thompson The Honorable Alfred R. Fraczkowski The Honorable Charles M. Oberly, III The Honorable Edwin H. Clark II The Honorable Patrick W. Murray The Honorable Thomas B. Ferry Lawrence M. Sullivan, Esq. Eugene M. Hall, Esq. Rodman Ward, Jr., Esq. Daniel L. Simpson Lowell L. Groundland Thomas W. Nagle Edward G. Pollard Anna A. Lewis All Delaware Law Enforcement Agencies Law Libraries: New Castle, Kent, Sussex File BoatInfl/LM90-175/doc



HOUSE OF REPRESENTATIVES

BLY MAY 1 8 1990

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135TH GENERAL ASSEMBLY

HOUSE BILL NO.290 AS AMENDED BY

SENATE AMENDMENT NOS. 1, 3, AND 6

AN ACT TO AMEND TITLE 23, DELAWARE CODE, RELATING TO THE OPERATING, AND/OR CONTROL OF A VESSEL OR BOAT UPON THE WATERS OF THE STATE OF DELAWARE WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAMARE (two-thirds of all members elected in each House thereof concurring therein):

Section 1. Amend Section 2116(b), Chapter 21, Title 23, Delaware Code, by striking said Subsection in its entirety and substituting in lieu thereof the following:

"(b) No person may use any vessel to which this Subchapter applies, including those exempt in §2115 of this Title, or any water skis, aquaplane, surfboard or similar device in a negligent manner so as to endanger the life, limb or property of any person."

Section 2. Amend Title 23, Delaware Code, by adding a new Chapter to read as follows:

"Chapter 23. OPERATION OF A VESSEL OR BOAT WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR AND/OR DRUGS.

§2301. Definitions.

- (a) 'Vessel' shall mean every device in, upon or by which any person may be transported upon the water excepting devices moved by human power.
- (b) 'Underway' shall be defined as any vessel which is not at anchor or made fast ashore.
- §2302. Operation of a vessel or boat while under the influence of intoxicating liquor and/or drugs.
- (a) No person shall motor, sail, row, operate, command or have actual physical control of any vessel or boat underway on Delaware waters while under the influence of intoxicating liquor or drugs or any combination of drugs and/or intoxicating liquors.
- (b) Any person charged under Subsection (a) of this Section whose blood alcohol concentration is one tenth of I% or more by weight as shown by a chemical analysis of a blood, breath or urine sample taken within 4 hours of the alleged offense shall be

guilty of violating Subsection (a) of this Section. This provision shall not preclude a conviction based on other admissible evidence.

(c) The fact that any person charged with violating this Section is or has been legally entitled to use alcohol or a drug shall not constitute a defense against any charge of violating this Section.

§2303. Consent to submit to chemical test.

- (a) Any person who motors, sails, rows, commands, operates or has actual physical control of a vessel or boat underway on the waters of this State shall be deemed to have given his consent, subject to this Section and §2202 of this Title, to a chemical test or tests of his blood, breath and/or urine for the purpose of determining the presence of alcohol or a drug or drugs. The testing may be required of a person when an officer has probable cause to believe the person is in violation of §2302 of this Title, or a local ordinance substantially conforming thereto.
- (b) At the time that a chemical test specimen is required, the person may be informed that if testing is refused, the person shall be prohibited from operating a vessel upon Delaware's waters for a period of one (1) year.
- (c) If there are reasonable grounds to believe that there is impairment by a drug or drugs which are not readily subject to detection by a breath test, a blood and/or urine test may be required even after a breath test has been administered.

(d) Alternative tests; physical incapacity.

If for any reason a person is physically unable to supply enough breath or complete the chemical test, he shall submit to other chemical tests as designated by the officer, subject to the requirements of Subsection (a) of this Section. Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal shall be deemed to not have withdrawn the consent provided in §2303 of this Title and any test may be performed as provided in Subsection (a) of this Section.

(e) Refusal to submit as admissible evidence.

Upon any trial of any action or proceeding arising out of the acts alleged to have been committed by any person while in violation of §2202 of this Title, the court may admit evidence of the refusal of such person to submit to a chemical test of his breath, blood or urine.

(f) Admissibility in evidence of results of chemical test.

(1) Upon the trial of any action or proceeding arising out of acts alleged to have been committed by any person while under the influence of alcohol, and/or drugs or any combination thereof, with respect to any chemical test taken by or at

the request of the State, the court shall admit the results of a chemical test of the person's breath, blood or urine according to the normal rules of evidence.

- (g) The informing or failure to inform the accused concerning the implied consent provision shall not affect the admissibility of such results in any prosecution for a violation of §2302 (a) of this litle.
- (h) The doctor-patient privilege shall not apply to the disclosure to law-enforcement personnel nor the admissibility into evidence in any criminal proceeding of the results of a chemical test of a person's blood, breath or urine for the purpose of determining the alcohol or drug content of his blood irrespective of whether such test was done at the request of a treating physician, other medical personnel, or a peace officer.

§2304. Refusal to submit to chemical test.

- (a) If any person requested refuses to submit to a chemical test pursuant to §2303 of this Chapter, after being informed of the penalty for said refusal, that person shall be prohibited from operating a vessel upon Delaware waters for a period of one (1) year. This prohibition shall begin the day of said refusal.
- (b) The Secretary of the Department shall notify in writing said persons of this prohibition and its duration and shall maintain a list of these individuals.
- (c) Operation upon Delaware waters during the period of prohibition provided in subsection (a) of this section shall be punished by a fine of not less than \$500 nor more than \$2000 and/or 30 days in jail or both.

§2305. Penalties; jurisdiction.

Whoever is convicted of a violation of Section 2302 of this Chapter shall:

- (1) For the first offense, be fined not less than \$200 nor more than \$1000 or imprisoned not less than 60 days nor more than 6 months or both.
- (2) For each subsequent like offense occurring within 5 years from the former offense, be fined not less than \$500 nor more than \$2000 and imprisoned not less than 60 days nor more than 18 months. For the purposes of this Subsection, prior offenses shall include those occurring in any other state, the District of Columbia or under generally conforming local ordinances. A conviction for a violation of a criminal statute dealing with injury or death caused to another person by the person's driving or operation of the vessel, under the influence was included as an element of such charge, shall constitute such a first or similar offense if occurring within 10 years from the subsequent offense.

(3) Jurisdiction for violation of this chapter shall be in the Justice of the Peace Courts.

§2306. Enforcement of Chapter.

Any person authorized to make arrests under the laws of the State may enforce this Chapter.

§2307. Persons Qualified to Administer Tests.

Any person qualified under §2746 of Title 21 shall be qualified for the purposes of this chapter to withdraw blood from a person submitting to a chemical test or obtaining a specimen of breath or urine under this chapter.

§2309. Disposition of Vessel and Property.

- (a) Where the only person on a vessel is an individual suspected of violating this Chapter, the following procedure shall apply:
 - 1. The vessel shall be towed to a safe port and be secured.
 - 2. An inventory of the vessel's contents shall be made. The occupant of the vessel shall sign the inventory and receive a copy thereof.
 - 3. All contents of the vessel shall be secured on the boat whenever possible. If it is not possible to secure the contents on the vessel, the contents must be secured safely elsewhere.
 - 4. The vessel shall remain secured until the vessel's occupant or their designee is capable of assuming responsibility for the vessel.
- (b) Where more than one person is on a vessel which has been stopped for a suspected violation of this Chapter, the following procedure shall apply:
 - 1. The vessel shall be towed to a safe port and be secured unless there is a competent person on the vessel who is designated by the operator to take responsibility for the vessel.
 - 2. If there is no competent person on the vessel to operate it, the procedures set forth in subsection (a) of this section shall apply.
 - (c) A vessel shall be considered at "a safe port and be secured" if:
 - 1. The vessel is placed at a marina under a bailment contract with the marina operator, at the owners expense. The marina operator must be paid a storage fee by the owner or operator upon release of the vessel. When a vessel is placed at a marina, the marina operator shall sign and receive a copy of the inventory of the vessel; or
 - 2. The vessel is transported to a State-operated facility.

(d) Where a vessel which has been stopped for a suspected violation of this Chapter has been damaged or has caused damage as a result of its operation in violation of the Chapter, the vessel may, at the direction of the investigating agency, be removed and impounded for evidentiary purposes. The vessel shall be inventoried pursuant to subsection (a)(2) of this Section, but the vessel shall not be released until evidentiary processing is completed."

Section 3. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to that end the provisions of this Act are declared to be severable.